

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-216310, B-216310.2
B-216310.3

DATE: August 26, 1985

MATTER OF: Martin Marietta Data Systems;
National Data Corporation;
Technicon Data Systems Corp.

DIGEST:

1. Failure of protesters to file comments after debriefing suggests that protesters knew bases for protests against application of solicitation's cost/technical tradeoff criteria when protesters received notice of award and cost of contract. These protests are untimely under GAO Bid Protest Procedures, because they were not filed within 10 working days of notice.
2. Untimely protests against application of cost/technical tradeoff criteria in negotiated procurement do not fall within significant issue exception to timeliness rules of GAO Bid Protest Procedures, because they apply only to present procurement and involve issues pertaining to evaluation of proposals which have been considered previously.
3. Allegation, filed after final closing date for proposals and award of contract, that amendments to request for proposals diluted requirements in favor of other vendors is untimely. GAO Bid Protest Procedures require that allegations of improprieties apparent in a solicitation be filed prior to the next closing date for submission of proposals.
4. Contention that agency improperly distributed information not generally available to each offeror in second request for best and final offers by pointing out only those deficiencies in each offeror's own proposal is little more than a description of normal conduct of negotiations where information is limited to

preclude disclosure of proprietary information. Protester offers nothing which persuades GAO that second call for best and final offers, to cure deficiencies in cost proposals, was unreasonable.

5. The composition of technical evaluation teams is within contracting agency's discretion. GAO will not review qualifications of panel members absent showing of possible bad faith, fraud or conflict of interest, none of which is alleged here.
6. Contention that independent evaluations for three separate contracts to be awarded under request for proposals (RFP) were inconsistent, subjective and not properly supervised so as to preclude a fair evaluation, is without merit. RFP clearly advised of subjective nature of evaluation and offerors were on notice that three independent evaluations would be performed.
7. Contention that technical evaluations were inconsistent because two of three evaluation teams found that protester offered only 10 and 13 of 16 optional software modules allegedly offered is without merit where offers ranged from completed programs to an offer to work with the agency to develop a module. Evaluators could reasonably perceive these offers differently.
8. Allegation that evaluators "could not possibly have found" any basis for awarding protester less than perfect score in "vendor stability" is without merit where evaluation shows that evaluators found a lack of experience with financial and management systems, consistent with evaluation of rest of proposal which frequently noted related deficiencies in other categories.
9. Contention that award of contract to higher-priced, higher-scored offeror was improper is without merit where protester has not provided evidence that contracting officer's determination that higher technical score of awardee justified higher price was unreasonable, particularly where contracting officer

merely adopted results of evaluation which included cost as a factor. It is not GAO's practice to conduct investigations in response to protests; rather, burden is on protester to affirmatively establish bases for protest.

On September 5 and 6, 1984, Martin Marietta Data Systems (MMDS), National Data Corporation (National) and Technicon Data Systems Corp. (Technicon) filed protests against three contracts awarded by the Veterans Administration (VA) under request for proposals (RFP) No. 101-2-84. We dismiss the protests in part and deny them in part.

The VA issued this RFP in October 1983 for the installation and management of commercial integrated hospital computer systems at three VA medical centers (VAMC)--a large VAMC in Philadelphia, Pennsylvania, a medium-sized VAMC in Saginaw, Michigan, and a small VAMC at Big Springs, Texas--to provide a pilot demonstration and test of commercial systems in VAMC's and provide a basis for comparison with VA's own system, known as the "decentralized hospital computer system" or DHCP. In general terms, these systems provide for the automation of patient information and recordkeeping functions, such as in- and out-processing, medical histories, pharmacy records, etc.

The RFP identified the mandatory minimum requirements and additional optional capabilities which would be evaluated, if offered, and provided the information needed for vendors to prepare separate proposals for each test site. Evaluation scoring was to be weighted on the basis of 65 percent technical, 25 percent systems life cost (20 percent for the test site and 5 percent for the optional sites), and 10 percent for corporate experience. Evaluation teams from each site were to evaluate and score proposals for their particular facility. VA was then to apply a formula combining the technical and cost scores to arrive at a single composite score for each VAMC. The selection was to be based on the highest scored proposal for each site, with award contingent upon the successful performance of a functional demonstration. The RFP also required options for the expansion of the systems to additional sites.

The three successful offerors were Shared Medical Systems (SMS) for the Philadelphia VAMC, McDonnell Douglas Automation (McAuto) for the Saginaw site, and Electronic Data Systems (EDS) for the Big Springs site. Each of these vendors had the highest combined score for its particular site; EDS was also the lowest priced competitor for the Big Springs site. Neither McAuto nor SMS offered the lowest

price for their sites; the contracting officer, however, specifically determined that the additional technical merit reflected in these two proposals justified award to the higher-priced offerors. With respect to the Philadelphia site, the contracting officer noted that MMDS was the third-ranked offeror and, although the total cost difference between MMDS and SMS was approximately \$13 million, the difference in evaluated costs was only about \$8.8 million, which the contracting officer determined was offset by the significant technical advantages of SMS's proposal. We note that the total undiscounted costs for the Philadelphia VAMC and related optional sites were all in excess of \$700 million.

The VA awarded the contracts for the Philadelphia and Saginaw VAMC's on August 10, 1984, and advised the unsuccessful offerors of these awards and their evaluated prices between August 10 and 13, 1984. The VA awarded the Big Springs contract to EDS on August 22.

On September 5, 1984, MMDS filed a protest with our Office challenging the award of the Philadelphia contract to SMS. MMDS contends that this award was "incomprehensible" given the substantial cost difference between SMS and MMDS when both were technically compliant and within the competitive range. National's protest, also filed on September 5, echoes MMDS's protest and adds the assertion that the VA failed to adhere to the evaluation criteria in the RFP. Technicon filed its protest on September 6, challenging the award of all three contracts. Technicon objects to the evaluation criteria, and VA's conduct of the evaluations and the contract awards.

The VA debriefed Technicon and MMDS on September 18 and 28, 1984, respectively. On October 1, 1984, Technicon supplemented its protest on the basis of information obtained in its debriefing. MMDS did not supplement its protest. National has filed nothing since its initial protest.

The VA contends that all three protests against the Philadelphia award, as well as Technicon's protest against the Saginaw award, are untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1984), because they were not filed within 10 days of notice to the protesters of the award of these contracts. 4 C.F.R. § 21.2(b)(2). The VA also challenges the timeliness of the additional bases of protest raised by Technicon, discussed below.

MMDS argues that the VA waived timeliness as an issue by failing to raise this question until a conference was held on the protest on January 23, 1985. MMDS also asserts

that its protest involves a substantial contract and should, therefore, be considered under the significant issue exception provided for in our procedures. 4 C.F.R. § 21.2(c).

As an initial matter, we point out that our timeliness requirements provide objective criteria for application by our Office which may not be waived by agency action. See, e.g., BHT Thinning, B-217105, Jan. 16, 1985, 85-1 CPD ¶ 44. Moreover, later discovered evidence supporting an untimely protest will not make the protest timely. Birdsboro Corp., B-218100, Feb. 11, 1985, 85-1 CPD ¶ 180.

The record shows that the VA advised all three protesters by telephone of the award of the Philadelphia site to SMS--and the evaluated cost of the contract--sometime prior to August 13. MMDS's failure to file comments after its debriefing persuades us that MMDS knew the basis for its protest--a challenge to VA's application to this site of the RFP's cost/technical tradeoff criteria--upon receipt of VA's advice of the award. MMDS delayed, however, filing its protest with our Office until September 5, 1984, more than 10 working days later. We have held that oral notice of the basis for a protest is sufficient to start the 10-day period for filing a protest. Electro-Tech, Inc., B-215657, Aug. 14, 1984, 84-2 CPD ¶ 178; The Bendix Corp., B-214142, Mar. 12, 1984, 84-1 CPD ¶ 285. MMDS's protest is, therefore, untimely and not for consideration. 4 C.F.R. § 21.2(b)(2). National's protest, to the extent that it parallels MMDS's protest, is also untimely and National has shown no interest in the remainder of its protest by filing additional comments or responding to the VA's report on the protest. Moreover, in order to invoke the significant issue exception to our timeliness rules, a protest must not only evidence a principle of widespread importance to the procurement community, but must also involve a matter that has not been considered on the merits in a prior decision. Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 CPD ¶ 121. The issues raised by MMDS and National are germane only to this procurement and involve principles pertaining to the evaluation of proposals which have been considered previously. These protests are dismissed.

Technicon challenges all three awards on essentially three bases: First, Technicon contends that the VA diluted its requirements during the course of the procurement, which Technicon suggests favored other vendors; second, Technicon contends that the three VA evaluation teams were subjective and inconsistent in their conduct of the evaluation and lacked the capacity to properly evaluate the proposals, and that the VA failed to properly supervise the evaluation with

the result that the evaluation was unfair; and, finally, Technicon asserts, with particular regard to the Philadelphia award, that the contracting officer could not have found any substantive difference between Technicon's proposal and that of the awardee and that the award of this contract was therefore inconsistent with the standards of Harrison Systems Ltd., 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572 (discussed below). Technicon also proposes that our Office conduct a review of available off-the-shelf systems to ascertain vendor capabilities. We will treat these issues in this order.

Technicon's first contention is premised on its interpretation of amendments 4, 5 and 6 to the solicitation. In this regard, Technicon contends that it was the only vendor that could have met the VA's requirements as originally stated, but that the first two of these amendments diluted the requirements, thereby favoring other vendors and prejudicing Technicon. Technicon also asserts that amendment No. 6, which was a second call for best and final offers, favored other vendors because there were no deficiencies in Technicon's proposal which would have justified reopening negotiations.

Our Bid Protest Procedures required that protests against alleged improprieties apparent in a solicitation, or against apparent improprieties which are added by amendment, be filed before the next closing date for the solicitation. 4 C.F.R. § 21.1(b)(1). Technicon's objections here are to alleged improprieties which were or should have been evident from the amendments. Technicon, however, did not protest these amendments until after award of the contracts. These contentions are untimely and will not be considered.

Technicon also challenges the propriety of issuing a second call for best and final offers (amendment No. 6, noted above) to each offeror which addressed only the deficiencies in that particular offeror's proposal. Technicon asserts that this allowed the VA to distribute information that was not generally available and allowed its competitors to better their standing in the procurement. This contention, first raised in Technicon's "supplement" to its protest, appears to be based on information obtained in Technicon's debriefing and is, therefore, timely because this supplement was filed within 10 working days of Technicon's debriefing.

The VA reports that there were numerous deficiencies in the cost proposals that precluded an adequate evaluation and that all proposals had deficiencies. The VA determined that these deficiencies were not susceptible to clarification but required the reopening of negotiations.

We have not questioned the use of multiple best and final offers where they were reasonably required. See, e.g., Kisco Co., Inc., B-216646, Jan. 18, 1985, 85-1 CPD ¶ 56; Crown Point Coachworks and R & D Composite Structures et al., B-208694, et al., Sept. 29, 1983, 83-2 CPD ¶ 386. Technicon's allegation amounts to little more than a description of the normal conduct of negotiations, in which each vendor is apprised of only the deficiencies in its own proposal to avoid the disclosure of proprietary information. Technicon offers nothing which persuades us that VA's determination to conduct such negotiations was not reasonable. This aspect of Technicon's protest is denied.

Technicon's second principal basis for protest amounts to a challenge to VA's conduct and supervision of the evaluation and to the competence of VA's evaluation teams. For support, Technicon relies, in large part, on inferences Technicon draws from its own analysis of evaluation scoring materials, including raw score sheets, and on information which Technicon obtained in its debriefing.

In support of its contention that VA's evaluation was inconsistent, Technicon points particularly to the scoring of proposals in the categories of "overall technical approach" and "facilities management." In the former category, Technicon's proposal received scores of 87, 93 and 100 (out of 100) for the Philadelphia, Big Springs and Saginaw sites, respectively; this equated to being tied for first/second for the Saginaw site and ranked third at the other two sites. In the latter case, Technicon was scored at 90, 94 and 84 (out of 100); this resulted in being ranked second, third and sixth in this category. As further evidence of the alleged inconsistency of the evaluation, Technicon states that although it offered all 16 of the optional modules called for in the RFP, one evaluation team considered that Technicon offered only 10, while another team found only 13.

Technicon also asserts that VA's evaluation of "vendor stability," which included consideration of past and present involvement in hospital systems and the number of systems installed, among other subfactors, was clearly subjective. In this respect, Technicon asserts that there is no reason

why it should not have received the maximum score, particularly with respect to the Philadelphia site, where it was ranked second with a score of 81, while the awardee received 100 out of 100 in this category. Technicon states that it has "installed seven systems in the State of Pennsylvania, five of which are in the Philadelphia area," and asserts that it has more systems in place than does the awardee.

Technicon suggests that the subjectivity of the evaluation and these apparent inconsistencies, coupled with the apparent lack of instruction to the evaluators in the complexities of hospital systems and the absence of management and direction by VA which they evidence, precluded a fair evaluation.

In response to Technicon's assertions, the VA states that the evaluation was comprised of staff members with specific experience or knowledge in various aspects of health care and the use of computer technology to support these functions. The VA also states that the teams were counseled daily regarding the procurement and evaluation process and the need to be fair and equitable. The VA also asserts that Technicon was aware that the three sites were to be evaluated independently and contends that in any evaluation involving subjective factors, such as this one, some inconsistency is to be expected. The VA contends that the apparent inconsistencies here were not as "blatant" as Technicon argues and suggest that they were within reasonable limits. With respect to the evaluation of proposals for the Philadelphia site, the VA states that the awardee's proposal was superior in several respects and, with particular regard to the evaluation of "vendor stability," was far superior in addressing how VA's needs were to be met.

We have held that the composition of technical evaluation panels is within the discretion of the contracting agency and that we will not review the qualifications of panel members absent a showing of possible fraud, bad faith or conflict of interest. Henderson Aerial Surveys, Inc., B-215175, Feb. 6, 1985, 85-1 CPD ¶ 145; CBM Electronic Systems, Inc., B-215679, Jan. 2, 1985, 85-1 CPD ¶ 7; New York University, B-195792, Aug. 18, 1980, 80-2 CPD ¶ 126. None of these is even alleged here. In these circumstances, we find Technicon's challenge to the competency of VA's evaluation panels to be without merit.

With regard to the balance of this major contention, we point out that our review of an agency's technical evaluation is limited to the question of whether the evaluation is

reasonable. Rapistan, a Division of Lear Siegler, Inc., B-215837, Nov. 23, 1984, 84-2 CPD ¶ 549. In making this assessment, we will ordinarily accept the considered judgment of the procuring activity unless it is shown to be erroneous, arbitrary or made in bad faith. Guardian Electric Mfg. Co., 58 Comp. Gen. 119 (1978), 78-2 CPD ¶ 376; Herplane Industries, Inc., B-215910, Feb. 8, 1985, 85-1 CPD ¶ 165. Moreover, we have consistently held that it is not the function of our Office to resolve technical disputes. Rapistan, a Division of Lear Siegler, Inc., supra.

In our opinion, the RFP clearly indicated the nature of the evaluation to be performed by emphasizing the importance of the technical evaluation over price and by specifying that the evaluation would include such areas as those to which Technicon alludes. We have recognized that evaluations of this type inherently involve subjective judgments which may be quantified objectively in evaluation formulae similar to those used here and that assessments of relative technical merit of proposals may be based on such subjective judgments. See, e.g., High Plains Consultants, B-215383, Oct. 18, 1984, 84-2 CPD ¶ 418; Culp/Wesner/Culp, B-212318, Dec. 23, 1983, 84-1 CPD ¶ 17. We have also recognized that independent evaluations of this nature can result in reasonable but seemingly inconsistent scoring in apparently identical procurements because each procurement is a separate transaction and the action taken on one procurement does not govern the conduct of all similar procurements, and have held that the simple assertion of inconsistency, without more, does not satisfy the protester's burden of affirmatively proving its case. Gross Metal Products, B-215461, Nov. 27, 1984, 84-2 CPD ¶ 577.

We agree with the VA that some degree of inconsistency was to be expected and, on the record before us here, are of the opinion that the inconsistencies which did occur fall within reasonable limits, a view for which we find support in scoring matrices prepared by Technicon. (These matrices display the scores and relative rankings of each offeror for each category of the evaluation, by evaluation team, with accompanying bar charts.) We note particularly that the offeror's relative rankings exhibit consistency by being clustered within a narrow range (i.e., offeror is ranked first, second and second or first, second and third) far more frequently than they do inconsistency (i.e., offeror is ranked first, sixth and sixth). Moreover, when there do seem to be anomalies, they frequently appear to be more attributable to a narrow range of scores rather than to any

unreasonable disparity in scoring. For example, under the "patient registration" category, one evaluation team's rankings of all vendors are separated by a total of only 5 points out of 25.

The evaluation teams' perceptions of Technicon's optional module offerings and the evaluation of Technicon's "vendor stability" also appear to be reasonably based. In this respect, we note that Technicon's proposed optional modules ranged from the offer of completed modules to, in one instance, an offer to work with VA to develop a module to support VA's needs. In these circumstances, we do not find it unreasonable that the evaluators may have had different perceptions of which modules Technicon was actually offering and counted them differently. Moreover, the evaluation of Technicon's "vendor stability" noted a significant weakness in Technicon's experience with financial and managerial systems, which we find to be consistent with Technicon's evaluation in other categories, which frequently noted related weaknesses. SMS, the awardee for the Philadelphia site, was considered very strong in this area.

On the whole, we do not find this to be persuasive evidence of unreasonable disparities in the evaluation. Moreover, since offerors were aware that VA intended to conduct independent evaluations for each site, much as if each VAMC had issued its own RFP, we do not believe VA was required to manage the evaluations to accomplish 100 percent consistent scoring.

These aspects of Technicon's protest are denied.

Technicon's final basis for protest is, in effect, a contention that VA should have considered Technicon's proposal to be technically equal to SMS's proposal and awarded the contract to Technicon on the basis of its lower costs. In negotiated procurements, however, there is no requirement that the award be made on the basis of lowest cost. The procuring activity has the discretion to select a higher rated technical proposal instead of a lower rated, lower cost proposal if doing so is consistent with the evaluation scheme in the solicitation. See Litton Systems, Inc., Electron Tube Division, 63 Comp. Gen. 585 (1984), 84-2 CPD ¶ 317; Henderson Aerial Surveys, Inc., supra. Thus, an agency may award to a lower rated, lower priced offeror where the contracting officer determines that there is no significant technical difference between proposals and the

award would be the most advantageous for the government. Harrison Systems Ltd., supra, to which Technicon alludes. Conversely, an award to a higher-priced, technically superior offeror is not objectionable where technical factors are more important than cost if the lower prices are offset by the advantages of the technically superior proposal. Environmental Science and Services Corp. et al., B-216893, et al., Mar. 4, 1985, 85-1 CPD ¶ 269; Barber-Nichols Engineering Co., B-216846, Mar. 25, 1985, 85-1 CPD ¶ 343. Moreover, we have held that where the solicitation, in effect, notifies offerors that the relative importance of cost versus technical factors is predetermined, the evaluation scores are controlling unless selection officials determine that, notwithstanding the difference in technical scores, there is no significant difference in technical merit between proposals. Technical Services Corp., 64 Comp. Gen. 245 (1985), 85-1 CPD ¶ 152.

As we noted above, the VA contracting officer specifically determined that the technical superiority, reflected in VA's evaluation scoring, of the proposals submitted by SMS and McAuto justified the added cost of their offers. Given our discussion, above, of Technicon's challenges to VA's evaluation, we find no basis on which we might conclude that the technical distinctions which VA found were unreasonable. Moreover, since the contracting officer's ultimate determinations represent little more than the adoption of the results of a technical and cost evaluation formula to which no offeror objected, we find no basis on which we might object to these determinations. Finally, it is not our practice to conduct investigations in response to a protest; rather, it is the protester's burden to establish the basis for its protest. San Diego Aircraft Engineering, Inc., B-217208, Mar. 25, 1985, 85-1 CPD ¶ 347. This basis for protest is denied.

The protests are denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel